Filed 3/20/19 In re Desiree C. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re DESIREE C., a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. ROBERTA C., Defendant and Appellant.	G056863 (Super. Ct. No. DP024812-002) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Gary L. Moorhead, Judge. Affirmed.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and Appellant.

Leon J. Page, County Counsel, Karen L. Christensen and Deborah B. Morse, Deputies County Counsel, for Plaintiff and Respondent.

No appearance for the Minor.

* * *

INTRODUCTION

Appellant Roberta C. (Mother) appeals from an order summarily denying her section 388 motion[1] to regain custody of her daughter Desiree, now about age 12. While her motion did demonstrate some significant improvement in Mother's own ability to parent Desiree, it was lacking in any specific information showing that a change of custody would promote *Desiree's* best interests. Accordingly we affirm the order.

FACTS

Mother has three daughters: Veronica, born in 2005, Desiree, born in 2007, and D., who has a less common name, born in 2009. D. is a medically-fragile child, born with a serious congenital heart defect condition known as Tetralogy of Fallot. In 2014, mostly because of the medical neglect of D.[2], but also because Veronica and Desiree had missed too much school, dependency jurisdiction was established over all three daughters.

All three daughters were initially returned to the home of Mother and her husband Alex (Father) under a program of family maintenance. However, by April of 2015, the home was found to be filthy, and it appeared Mother was taking illegal drugs. So by July 2015, all three daughters had been removed from the home.

There is no question the parents were seriously involved with illegal drugs, and in fact a significant portion of the July 2015 dispositional hearing involved the question of how much the county would pay for the parents' drug treatment.

---

1 Of the Welfare and Institutions Code. All further statutory references are to that code.

2 She requires no less than 13 separate medications a day.

In the wake of the dispositional hearing, in August 2015, Veronica and Desiree were placed with a couple in a licensed foster home we will call "C&E." The two girls would remain there until the summer of 2017. The girls did well in C&E's care. Both girls felt close to C&E, even using parental terms (mama and papa) to describe them. (D., given her medical fragility, was placed with a different caretaker than Veronica and Desiree.)

Social workers hoped that C&E might want to adopt the girls, but visitation with Mother and Father proved problematic. As one social worker report written in June 2017 put it, "The caregivers no longer feel comfortable adopting the kids due to their emerging behaviors and they do not feel they can continue to care for the children with the parents' involvement." One major problem was that Mother and Father felt free to discuss the dependency case with the girls.

Social workers found another caregiver for the girls, a woman named M., in July 2017. Again, they thrived in the placement. M. was a retired teacher who had experience with foster children. She enrolled the girls in a private Christian school and was able to send them to a school camp in the Idyllwild area on occasion.

Meanwhile, the entire 18-month reunification period passed without much progress on Mother and Father's part. Mother tested positive for methamphetamine in September 2015, and again in July 2016. Mother further admitted to using methamphetamine sometime around September 2016. At the 18-month review hearing held February 2, 2017, the court found Mother's compliance with her reunification plan to have been "minimal." Mother made no argument to the contrary. And with no opposition from either parent, the court terminated reunification services.

But the problem of placement remained. By February 2017, the elder child, Veronica, had become so disillusioned with both parents that she did not want to visit them at all. Veronica was particularly distressed by the parents' history of canceling

visits prior to the 18-month review hearing. Accordingly, the court gave Veronica a veto power over any visitation.

The court anticipated a permanent plan being finalized at a hearing to be held May 18, 2017. But the adoption turned out not to be viable. The result was that the February 2017 hearing merely adopted the social workers' recommendation of long-term foster care for Veronica and Desiree. D.'s caretaker was willing to undertake a guardianship on her behalf.

After termination of services, the three children's cases progressed through a series of periodic reviews until the last one in our record, held July 10, 2018. Mother tested positive again for both methamphetamine and marijuana around the time of the May 18, 2017 hearing, and for marijuana afterwards, on June 5, 2017. In September and October 2017, there were domestic violence incidents in the Mother and Father's Tustin apartment.

A new complication in the case arose in December 2016, when Veronica made allegations to the effect she had been sexually abused by Mother back when she was around eight years old (which would have been sometime in 2015) and the family was living in La Habra. The La Habra police investigated the allegations, but were unable to corroborate Veronica's claims.[3] Even so, a La Habra detective opined to a social worker that both Veronica and Desiree were at risk if there were any unsupervised contact with Mother.[4]

Then, in late April 2018, Mother declared to a social worker that she was going to be filing for divorce.

---

[3] There were two alleged incidents, both of which happened, said Veronica, when Mother was clearly drunk. In one, Mother exposed her vagina to Veronica. In the other, she pulled up Veronica's shirt and kissed her on the chest and stomach.

[4] The record also has one instance of Mother's less-than-salutary behavior toward Desiree. Sometime in April 2018, a visit was cut short after Desiree complained that Mother was tickling her feet to the point of making her cry.

As noted, both Veronica and Desiree did well in their placement with M. But M. was in her 70's and was not willing to continue he foster care of the girls beyond the end of the 2017-2018 academic year. Even by June 2018, Veronica, now 13 years old was still unwilling to see her parents, as her attorney made quite clear in open court.

During the summer of 2018, M. arranged for the girls to go to summer camp in June and agreed to extend her foster care to August 1, 2018. And that is where our record of Veronica's and Desiree's placements ends. Nine days later, on August 9, 2018, Mother filed three separate section 388 motions seeking custody of all her daughters, including D.

The motions were supported by identical declarations making these points: Mother had been clean and sober for 15 months. She was currently in counseling with an addiction-focused group. She had attended a program at the Gary Center focused on addiction. She had completed a parenting class in September 2015. She had attended domestic violence classes, with no date given. She had appropriate living quarters for the children. And – in contrast to her April 2018 declaration that she was getting divorced in April 2018 – she was now "get[ting] along well" with Father and the two of them were "focused on our common goal of reuniting our family" She was also having good visits with Desiree and D., and, of course, Veronica and Desiree were now facing the loss of their foster home.

The trial court summarily denied the motions without a hearing. The court's orders of denial each stated: "The court file is replete with recent information that return of the children to the mother is not in their best interests. The SSA is authorized to liberalize/restrict the frequency of the mother's visitation (based on her change of circumstances). There is no showing of any abuse of that discretion."

Mother filed this appeal from the denial orders.

DISCUSSION

Mother has abandoned any argument as to either Veronica – the eldest child who refuses to see her – or D., who is medically fragile. Her sole argument on appeal involves only Desiree.

She devotes much of her opening brief to contending that the proper standard of review from the summary denial of a section 388 motion is de novo, as distinct from review under an abuse of discretion standard. We will assume the proper standard is de novo, though there are good arguments both ways.[5] However, even under the more rigorous de novo standard of review we still conclude Mother failed to make out a prima facie case for a change of custody of Desiree in her August 9, 2018 motion.

Two basic principles of juvenile dependency law animate our conclusion. First, to make out a prima facie case, the moving party must show that the requested change is based on (1) "a change in circumstances or new evidence *and*" (2) will promote "the child's best interests." (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1157 (*G.B.*); *In re Zachary G.* (1999) 77 Cal.App.4th 799, 808.) Second, the section 388 motion must "describe specifically" how the change will advance the child's best interests. (*G.B. supra*, 227 Cal.App.4th at p. 413; *Anthony W.*, *supra*, 87 Cal.App.4th at p. 250.)

---

[5] Mother correctly points out that in proceedings based on a review of the paperwork only – such as demurrers or summary judgment motions – the basic standard is review de novo. Since the denial of a section 388 motion without a hearing is certainly the functional equivalent of a proceeding based on paperwork only, it would make sense that it should be reviewed de novo. Moreover, one of the most important due process safeguards in the law of juvenile dependency procedure is the need to liberally construe the section 388 motion in favor of its sufficiency (see *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413-1414; *In re Heather P.* (1989) 209 Cal.App.3d 886, 891) and liberal construction is classically a linguistic analysis tailor-made for de novo review.

On the other hand, the weight of appellate authority easily supports use of an abuse of discretion standard. (E.g, *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079; *In re Angel B.* (2002) 97 Cal.App.4th 454, 462-464; *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250 (*Anthony W.*); *In re Aljamie D.* (2000) 84 Cal.App.4th 424, 431, 433; *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450–1451 (*Jamika W.*).) Further, a section 388 motion is tested based on a review of the entire record (e.g., *In re S.B.* (2009) 46 Cal.4th 529, 536 ["[i]n a modification proceeding, all the relevant circumstances will be before the court"];*In re Justice P.* (2004) 123 Cal.App.4th 181, 189; *Jamika W.*, *supra*, 54 Cal.App.4th at pp. 1450-1451) and entire record review is at least more consonant with an abuse of discretion standard, since – as the present nicely illustrates – in all likelihood the same judge will have lived with the case and have a better feel for both whether there has been a genuine change of circumstances and what is in the bests interests of the dependent children.

Here, Mother's petition fails on the necessary showing of *specific* description of how a change of custody to her will promote Desiree's best interests. We count four gaps in her declaration in regard to establishing that a change of custody would promote Desiree's best interests:

First is the effect a change in Desiree's placement would have on her relationship with her elder sibling Veronica. The record is clear Desiree cares much for her sister Veronica. Yet, as the opening brief readily concedes, there is no way that Veronica should (or now can) be placed with Mother (and Father). As of the summer of 2018, her counsel represented to the court she was "adamant" in not wanting to see either Mother or Father. There is nothing in Mother's moving papers that addresses how separating Veronica from Desiree will promote *Desiree's* best interests.[6] In fact, given the importance of sibling relationships found in a variety of places in the juvenile dependency statutes (see *In re Miguel A.* (2007) 156 Cal.App.4th 389, 395-396, quoting Sen. Com. on Judiciary, Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1987 (1999-2000 Reg. Sess.) as amended May 16, 2000), we would go so far as to say that to establish a prima facie case, Mother's motion would have had to *rebut* the natural inference from the Veronica-Desiree relationship that separating the two at this stage would not only *not* promote Desiree's best interests, but actually be affirmatively detrimental for Desiree. No such attempt was made.

A second gap involves school continuity. Desiree has thrived with her sister Veronica at a private school. Mother's moving papers do not address how a change of placement would benefit Desiree's educational situation, particularly given it would mean separation from Veronica and the emotional stability that the relationship with Veronica brings.

---

[6] We are mindful of our Supreme Court's decision in *In re Celine R.* (2003) 31 Cal.4th 45, 49-50. that, at least as applied to the sibling exception as regards the termination of parental rights in section 366.26 hearings, the key is to look to the child being affected by the termination, not the effect on that child's sibling.

The third gap relates to Mother herself. We are glad she was able to assert the completion of 15 months of sobriety in her moving papers.[7] But as late as the July 2018 periodic review, social workers were noting that Mother's pattern was to relapse into drug abuse when encountering "stressors." And there is no *current* expert opinion to reassure the court she would not relapse. Mother's papers did include a letter from her therapist detailing her progress, averring: "This is the time she will not use illegal substances again." But the letter was tentative – the therapist simply said she "want[ed] to believe" in Mother's resolve. And what is dispositive for us is that the letter was dated February 26, 20*16*, which long antedated Mother's relapses of July 2016, the second half of 2016, and the first half of 2017.

The fourth gap is Mother's living situation. Her declaration provides no assurance that the prospect of separating with Father – rather strongly proclaimed as late as April 2018 – might not yet occur. Such a separation would be particularly problematic for Desiree since Mother and Father were, as of the time of the section 388 motion, in a low-income subsidized apartment in Tustin and there is nothing in the record to suggest that Mother would necessarily be able to maintain even the low rent on that apartment should her declared intent to file for divorce ever come to pass.

Given these major gaps, we conclude Mother did not make out a prima facie case for a change of placement pursuant to section 388. The trial court's order was legally correct.

---

[7] Presumably the period from May 2017 (relapse with marijuana usage) to August 2018 (the section 388 motion). We will take this assertion at face value given our decision to employ a de novo review and the rule of liberal construction. Even so, we note that as late as April 2018 an uncle who had been living with Mother and Father in their Tustin apartment told Tustin police that Mother and Father "do" – present tense – use drugs.

DISPOSITION

The order appealed from is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.